

# The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?

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I would not be a law professor if I did not quibble with the title given this conference panel: "The President Versus the Senate in Treaty Interpretation." Is the field of treaty interpretation truly witnessing a titanic, adversarial struggle of the President versus the Senate? To me, that description seems about as accurate as characterizing what is going on in a good marriage as "Husband Versus Wife." We all know that a marriage contract mandates a partnership between husband and wife, with each spouse having his or her own role, but needing the other's concurrence to act for the family. In the same way, Article II of the Constitution mandates that the Senate and President act as partners in the treaty process, with each institution fulfilling a constitutional role that cannot take effect without the other's cooperation.<sup>1</sup> Even when particular issues prove contentious, as recently occurred during the Anti-Ballistic Missile (ABM) Treaty controversy, the two branches ultimately have little choice but to reach some kind of political accommodation. As the final resolution of that dispute revealed, the two branches simply need one another too much to allow political stalemate and acrimony to persist indefinitely.<sup>2</sup> A

† Professor of Law, Yale Law School. This comment derives from remarks made to the panel on "The President Versus the Senate in Treaty Interpretation: A Debate" at the American Bar Association Standing Committee on Law and National Security Conference on "Separation of Powers and the Debate About Treaty Interpretation Under the Constitution," held on March 15, 1990, in Washington, D.C.

1. See U.S. CONST., art. II, § 2, cl. 2 (The President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur.").

2. Following the Reagan Administration's effort to give the ABM Treaty a broad reinterpretation to accommodate development and testing of the Strategic Defense Initiative (SDI), see *infra* note 12, Congress issued a threefold response. It first declared that no funds from the 1988-89 fiscal year defense appropriation could be used for new SDI tests. See National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 225, 101 Stat. 1019, 1056 (1987). The Senate then reported "The ABM Treaty Interpretation Resolution," which reaffirmed its understanding of the original, narrow interpretation of the ABM treaty. See ABM Treaty Interpretation Resolution, S. Res. 167, 100th Cong., 1st Sess. § 2(1)(B), reprinted in SENATE COMM. ON FOREIGN RELATIONS, THE ABM TREATY INTERPRETATION RESOLUTION, S. REP. NO. 164, 100th Cong., 1st Sess. 117 (1987). The Senate then attached to its resolution of ratification to the Treaty Between the United States and the U.S.S.R. on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty) the "Biden-Byrd" condition, which specified that "the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the

few highly publicized recent instances of interbranch dispute over treaty interpretation should not overshadow more than two hundred years of relative harmony regarding the interpretation of literally thousands of treaties.

Unfortunately, some commentators have recently characterized the Senate's efforts to preserve its role in treaty interpretation during the ABM controversy as a "quest for legislative supremacy" through "pie-in-the sky" interpretations manufactured by "ultra-whiggish" Senators and law professors.<sup>3</sup> Such adversarial name-calling is not only unproductive, but needlessly exaggerates the quite narrow ground of difference that actually prevails between the two branches over the proper approach to treaty interpretation. In fact, I would argue, far less separates the Executive and Senate positions on treaty interpretation than most commentators would concede.

Let me demonstrate this point by considering the broad constitutional doctrine of treaty interpretation that both branches accept. Upon reflection, that doctrine reduces to four hornbook principles. First, under Article II, only the President has power to make a treaty for the United States, but only if the Senate has previously advised and consented to it by a vote of two-thirds.<sup>4</sup> Second, the Senate may withhold its consent to a treaty, or it may give that consent subject to certain conditions — ranging from reservations to declarations to understandings of what particular treaty terms mean.<sup>5</sup> Third, once the Senate has interposed its conditions to consent, the President (or our treaty partner) may decline to proceed with ratification. But if the President and our partner choose to make the treaty by exchanging instruments of ratification, they can

Senate at the time the Senate gave its advice and consent to ratification." See 134 CONG. REC. S6937 (daily ed. May 27, 1988). See generally Biden & Ritch, *The Treaty Power: Upholding a Constitutional Partnership*, 137 U. PA. L. REV. 1529 (1989) (recounting history of the condition). The President responded by ratifying the INF Treaty subject to that condition, but later questioning the condition's constitutionality. See *Message to the Senate on the Soviet-United States Intermediate-Range Nuclear Force Treaty*, 24 WEEKLY COMP. PRES. DOC. 779, 780 (June 10, 1988) [hereinafter Reagan INF Message]. See generally Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1366-80 (1989).

3. See Block, Casey & Rivkin, *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481, 1482 (1989) [hereinafter Block]. For a more recent statement of these authors' views, see Block & Rivkin, *Legislative Power Grab: The Anti-Federalist Counter-revolution in the Making*, N.Y. REV. BKS., May 17, 1990, at 50.

4. See *supra* note 1.

5. See *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869); *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 183 (1901) (Brown, J., concurring); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 (1986) [hereinafter RESTATEMENT (THIRD)].

only make the treaty to which the Senate has advised and consented.<sup>6</sup> In short, under United States law, the President is bound — both at the time of ratification and after — to honor the conditions upon which the Senate has based its consent.

Fourth and finally, the President thereafter has general authority to interpret treaties as law for the United States, subject to two simple, but important constraints. He may not reinterpret the treaty so as to make it a wholly different treaty from the one to which the Senate originally advised and consented. That would *de facto* amend the treaty — and make a new treaty in violation of Article II — without the consent of either the Senate or our treaty partner. Moreover, the President must remember that the final authority to interpret the treaty rests neither with him nor with the Senate, but with the judiciary, the third branch of government left curiously unmentioned by our panel title. Article III of the Constitution (not to mention *Marbury v. Madison*)<sup>7</sup> settled that the courts, not the President or the Senate, bear the final authority to decide cases and controversies arising under treaties made by the United States.<sup>8</sup> Once the Supreme Court has ruled on a matter of treaty interpretation, its ruling is authoritative as United States law and binds the political branches of the federal government, as well as all lower courts and the states.<sup>9</sup>

These principles should surprise no one. Indeed, in a recent book, I argue that *all* foreign affairs decisions in this country are governed by similar rules of constitutional law — deriving from the Constitution's structure and text, judicial decisions, framework statutes, and institutional practice — which jointly comprise what I call "The National Security Constitution."<sup>10</sup> The driving principle of that National Security Constitution is that checks and balances do not stop at the water's edge. The foreign affairs power, like all governmental power in this country, is

6. For a restatement of this principle, see section 2(1)(B) of the ABM Treaty Interpretation Resolution, *supra* note 2 ("If, following Senate advice and consent, the President proceeds to ratify a treaty, the President may ratify only the treaty to which the Senate advised and consented.").

7. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically, the province and duty of the judicial department, to say what the law is.").

8. U.S. CONST. art. III, § 2.

9. See, e.g., *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties and executive agreements"); *Jones v. Meehan*, 175 U.S. 1, 32 (1899) ("The construction of treaties is the peculiar province of the judiciary"). In construing treaties, United States courts tend to give great, but not conclusive, weight to interpretations offered by the Executive Branch. See, e.g., *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); RESTATEMENT (THIRD), *supra* note 5, § 326(2).

10. H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 67-72 (1990).

not exclusively Presidential, but rather, a power shared among the three branches of our federal government. The broader point of the four principles just outlined is that our National Security Constitution does not repose the power of treaty interpretation solely in any one branch. Instead, it allocates that power among all three branches, subject to a finely wrought system of institutional checks and balances.

If we can agree upon these four basic principles of treaty interpretation — Presidential power to make a treaty subject to Senate consent, senatorial power to condition its consent, Presidential power to make only the treaty consented to, and judicial power of final interpretation — then what's all the fuss about? The ABM Treaty fight, it seems to me, revolved around the third principle: that once the Senate has given its conditional consent, the President can only make the treaty to which the Senate has advised and consented, namely, the treaty *as the consenting Senate understood it to mean*. The ABM dispute raised this question: how do we know what the Senate understood a particular treaty to mean?

Again, no real dispute existed over at least half of the answer. All sides agreed that if the text of a particular treaty provision proves ambiguous, but the Senate *formally* declares its understanding of the provision's meaning at the time it consented — for example, by attaching an understanding to its resolution of ratification to the treaty — then the President must honor that formal understanding.<sup>11</sup> The ABM controversy arose over the informal, not the formal, half of the answer. Suppose ambiguity exists as to what the text of the treaty means, and the Senate does not formally declare its understanding of the provision's meaning when it consents? Must the President honor the Senate's complete understanding of a treaty, including its implicit understandings of particular provisions that were not formalized into writing? And can a third party — for example, a court or a treaty partner — look outside the text of the treaty to determine the Senate's complete understanding of a provision?

During the ABM treaty interpretation debate, the so-called pro-Congress advocates generally answered yes to these questions. Many pro-Executive commentators answered them in the negative. But in my view, one need not choose which end of Pennsylvania Avenue one favors to reach the legal conclusions that the President must honor the Senate's complete, shared understanding of a treaty and that one may divine that shared understanding by looking to extratextual materials. These con-

11. Compare Block, *supra* note 3, at 1486 with Koplow, *supra* note 2, at 1401-06.

clusions are neither pro-Congress nor pro-Executive. They are pro-Constitution, or just common sense.

Let me explain with an example from my everyday life. About a year ago, my three-and-one-half year old daughter Emily and I agreed that she could not drink soda without the consent of her mother or me. One day last week, she told me that she and a friend had agreed to get drinks from "the green bottle in the refrigerator." She asked, "is that okay?" After long shared experience, she knew, and I knew, and she knew I knew that we were both referring to the green bottle *of orange juice* in the refrigerator. And so I consented. Now if she and her friend then went to the refrigerator and drank from a green bottle of soda, or for that matter a green bottle of vodka, would she have breached our accord? Common sense would say yes, because even if she did not violate the literal words of our agreement, she would have violated our implicit common understanding regarding the scope of my consent. Had that occurred, I might also have been at fault, for failing to specify "you may drink from the green bottle containing orange juice and no other green bottle." But perhaps I would have thought that level of specificity unnecessary, because I knew of no other green bottles in the refrigerator. The main point is that I consented only to one act — namely, drinking orange juice. The act that I understood her to be contemplating was the only act that I authorized her to take.

This simple common sense principle also guides our constitutional law of treaty interpretation. When President Nixon asked the Senate in 1972 to consent to a treaty limiting the production of anti-ballistic missiles — a treaty the broad purpose of which was to prevent either party from creating territorial defense systems against strategic offensive missiles — and the Senate gave its consent, it authorized only the treaty it understood the President to be contemplating. When President Reagan purported to reinterpret particular words of that agreement to *authorize* development and testing of the Strategic Defense Initiative (SDI) — precisely the kind of territorial defense system the ABM Treaty proscribed — he violated the two branches' prior shared understanding of what had been authorized.<sup>12</sup> Perhaps the Senate, like me, was at fault for not specifying in greater detail what it was consenting to, but as the recent Biden-Byrd condition to the INF Treaty suggests, the Senate will not likely

12. In article I of the ABM Treaty the parties generally agreed "to limit anti-ballistic missile (ABM) systems" and "not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense." Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503, reprinted in 11 I.L.M. 784 (1972). In article V, the parties further undertook "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, *space-based* or

make that political mistake again.<sup>13</sup> But the legal point is the same as in the orange juice example: the Senate consented only to the treaty that it understood the President to contemplate — a treaty *barring* territorial defense systems — and the treaty it understood was the only one it authorized the President to make. If a subsequent President tries, through the guise of reinterpretation, to claim that the Senate in fact authorized a different treaty, then he is trying to amend the treaty without Senate advice and consent, violating the last of the four basic principles that I outlined earlier.

Executive branch supporters have lodged two objections against this conclusion, neither of which proves persuasive upon examination. The first is that even if one can know what an individual implicitly understands, one cannot know what the Senate *as a whole* intended a treaty to mean except by looking at the treaty's text.<sup>14</sup> Yet this objection raises a problem of proof, not a dispute over legal principle. The objection is not that implicit Senate intent does not count, only that one cannot easily determine what legislative bodies implicitly intended. Yet however difficult it may be to glean legislative intent, that task is one that courts tackle every day when they are asked to divine statutory intent by construing legislative histories. If a court can construe a statute by deducing Congress' implicit intent from extratextual sources, such as report language and floor colloquies, there seems no reason why third parties cannot similarly construe the Senate's intent underlying a treaty by looking to the same sources.<sup>15</sup>

mobile land-based." (emphasis added). The only ABM systems permitted by the treaty were two (later, one) fixed land-based systems described in article III.

The Reagan Administration's 1985 reinterpretation of the treaty claimed first, that article V's ban on the development, testing, and deployment of space-based ABM systems applied only to technologies that were "current" as of 1972, and second, that Agreed Statement D of the treaty permitted the development and testing (but not the deployment) of mobile ABM systems and components based on "other physical principles." See Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986). The Reagan Administration's reading of the treaty clashed with that held by all but one of the senior members of the delegation that negotiated the treaty, President Nixon himself, numerous Soviet officials and U.S. Senators, and many academic commentators. See generally R. GARTHOFF, *POLICY VERSUS THE LAW: THE REINTERPRETATION OF THE ABM TREATY* (1987); Koplow, *supra* note 2, at 1370-71 & nn.73-76 (1989) (cataloging critics of the reinterpretation).

13. See *supra* note 2. It remains to be seen whether the Senate will see fit to insert the Biden-Byrd Condition as boilerplate onto all future arms control treaties.

14. See, e.g., Block, *supra* note 3, at 1501-03.

15. A variant of this objection is that enforcing the Senate's implicit understanding of a treaty upon the President would give undue legal effect to unenacted legislative statements, which must be embodied in a formal resolution of ratification to have any legal significance. See, e.g., Block, *supra* note 3, at 1502 ("Even if intent can be proven beyond all doubt, it does not control. It is the actual language of the enacted legislation that is the law, *not the unenacted intent of the legislators.*") (emphasis added). Yet a court no more gives legal effect to unenacted legislative statements when it construes a treaty in light of Senate debates than it

The second objection, sometimes called the “two treaties” problem, charges that the principles above will create two treaties, one that the President makes with the Soviets and another that the President makes with the Senate, potentially subjecting the United States to different or conflicting interpretations.<sup>16</sup> Yet the problem is misnamed. In fact there are never two treaties. There is only one: the single treaty that the President and our treaty partner make *after* the Senate has given its consent. If the President’s understanding of a treaty does not match the Senate’s, he is free to reject the Senate’s resolution of ratification and leave the treaty unratified. What he lacks the freedom to do is to ratify the treaty subject to those conditions, then to reinterpret it inconsistently with them.

Again this is just common sense. When my wife and I sign a contract to sell to a third party a house that we jointly own, the “sellers’ intent” is ours, not mine or hers alone. In the same way, the intent of the “United States” as a party to the treaty refers not to the intent of the *President* when he transmits the treaty to the Senate for its advice and consent, but to the *common intent* of the Senate and President manifested after the Senate has returned the treaty to the President and the President has ratified it subject to the Senate’s conditions. For the President to claim a sweeping power of treaty reinterpretation after ratification would be akin to the President signing a statute, then subsequently construing its terms to mean their opposite.

It remains possible, of course, that the one treaty that the United States and its treaty partner make will create differing domestic and international legal obligations. Hence, this problem is not so much one of “two treaties,” as of the same treaty giving rise to differing obligations. But the key point is that the executive branch can both create and alleviate this “differing obligations” problem. Differing obligations arise only if the Executive — who serves as the go-between between the Senators and the Soviets — tells the Senate that a provision means one thing, then tells the Soviets the provision means something else. The most simple and obvious way to minimize the differing obligations problem is for the President to give both the Senate and the Soviets the same explanation of each treaty provision.<sup>17</sup>

does when it construes a statute in light of its legislative history. In both cases, the court is not giving legal force to stray legislative comments; it is looking to those remarks to determine what the legislative body as a whole intended when it passed the resolution of ratification or the statute that constituted the operative legal document.

16. See, e.g., Biden & Ritch, *supra* note 2, at 1543–44 (describing “two treaties” problem).

17. It is the Executive’s responsibility to ensure sufficient clarity in a treaty and in its explanations thereof to the Senate so that no conflict exists between the shared under-

Moreover, as any international lawyer knows, there is nothing unusual about a state assuming differing domestic and international legal obligations under a treaty. That problem recurs regularly, as for example, when Congress and the President enact implementing legislation that does not fully execute the terms of a nonself-executing treaty. Differing domestic and international legal obligations will almost inevitably arise in an international system where government officials are subject to both domestic and international legal obligations, and where treaty partners ratify the same treaty by different domestic processes. Nor is there any real dispute under United States law about how such differing obligations should be handled. If following a requirement of our domestic constitutional law would place the United States in violation of international law, it is well settled that United States officials must follow domestic law, and answer for any resulting international violation in an international forum.<sup>18</sup>

All of this strikes me as quite straightforward. The hard question is not *whether* we are constitutionally obliged to determine the President's and the Senate's shared understanding of a treaty, but *how* we are to do so. In particular, what evidence may we look at to divine that understanding? Are we restricted to the text alone, or may we also look to extratextual materials to determine the Senate's complete and shared understanding of a treaty? Three possibilities immediately come to mind. First, can we look to the negotiating history of the treaty, which may be massive, classified, fragmentary, a hodge-podge, or just unavailable? Second, what weight, if any, should we give representations made by executive branch officials to the Senate during the advice and consent process, but before ratification? And third, may we glean the Senate's understanding by looking at other preratification materials that were before the Senate when it consented, in particular, records of internal Senate deliberations or speeches made by particular Senators?

If our goal is interpretation, the short answer is that under both international and domestic law, we can and should consult such materials. As a matter of international law, the so-called New Haven School of jurisprudence has long argued that treaties should be interpreted by examination of context as well as text. As Myres McDougal, Harold Lass-

standing of the parties on the one hand and the shared understanding of the Executive and the Senate on the other.

SENATE COMM. ON FOREIGN RELATIONS, THE INF TREATY, S. EXEC. REP. NO. 15, 100th Cong., 2d Sess. 103 (1988) [hereinafter INF REPORT].

18. See RESTATEMENT (THIRD), *supra* note 5, § 115(1)(b) ("That . . . a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.").



well, and James Miller declared in 1967, “[i]t is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs — the text of a document — the role of serving as the exclusive index of the parties’ shared expectations.”<sup>19</sup>

As a matter of domestic constitutional law, the same point holds, beginning with negotiating history. Although what constitutes negotiating history may not always be clear, the question of when we may look at it seems quite easy. As in the case of legislative history, we may look to available portions of the negotiating history when the text of the treaty is ambiguous — i.e., whenever two interpretations of the same language are possible — and when those portions were before the Senate *at the time it gave its consent*. In determining the effect of a treaty under domestic law, the key issue should not be the intent of the treaty negotiators, but rather, the intent of the *Senate* when it consented to ratification of all or part of what the treaty negotiators agreed upon. To return to my earlier example, we do not determine whether I gave my consent to Emily and her friend to drink vodka from a green bottle by looking at what she *hoped* I would agree to (or what she and her friend *agreed upon* hoping that I would agree to). Instead we look to what I actually *intended* to authorize her to do, and what information was before me when I gave my authorization, because (like the Senate) I am the one whose consent she needed to take action.

What this means for the ABM Treaty reinterpretation debate is that the Reagan Administration could not lawfully base a new interpretation of particular provisions of the Treaty upon a secret negotiating history that the ratifying executive branch never revealed to the consenting Senate back in 1972. We should no more permit a treaty to be construed based on a previously secret negotiating history than we would permit the text of a statute to be construed in light of a previously secret legislative history. In both cases, that secret history did not form a part of the record upon which the legislators voted, and their votes, not the negotiators’ intentions, formed the legally decisive acts.<sup>20</sup>

In any event, both judicial decision and executive practice now seem largely to have settled this issue. In *Air France v. Saks*,<sup>21</sup> the Supreme Court declared that “[i]n interpreting a treaty it is proper, of course, to

19. M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* xvii (1967).

20. See *The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comm. on Foreign Relations and the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 412, 416-17 (1987) [hereinafter *Joint Hearings*] (statement of Professor Laurence H. Tribe).

21. 470 U.S. 392 (1985).

refer to the records of its drafting and negotiation.”<sup>22</sup> The executive branch also seems to have acquiesced in this view, having declassified and waived executive privilege on much of the negotiating history of the ABM Treaty during the reinterpretation dispute, and by providing the Senate with access to all thirty-one bound volumes of the negotiating history of the Intermediate-Range Nuclear Force (INF) Treaty during the debate over that treaty’s ratification.<sup>23</sup>

With regard to the second type of extratextual evidence — executive branch representations to the Senate — pro-Executive commentators continue to defend in theory absolutist positions that the executive branch itself has already renounced in practice. In March 1987, then-State Department Legal Adviser Abraham Sofaer appeared to adopt such an absolutist position when he testified that “[w]hen it [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, *irrespective of the explanations it is provided*.”<sup>24</sup> The absoluteness of his language — which implied both that the President can “make” a treaty before receiving senatorial advice and consent and that the executive branch is not bound by what it tells a consenting Senate a treaty means before ratification — soon gave rise to the term “Sofaer Doctrine.”<sup>25</sup> But like George Kennan’s “containment doctrine,” that term has now come to stand for something far more absolute than its author originally intended.<sup>26</sup> The “Sofaer Doctrine” now stands as shorthand for the proposition that, generally speaking, one should not look beyond the text of the treaty itself and the accompanying resolution of ratification to determine what the Senate intended. Insofar as Justice Scalia’s recent opinion concurring in the judgment in *United States v. Stuart*<sup>27</sup> implies that he, too, might take this absolutist position, perhaps it should be renamed the “Scalia Doctrine.”<sup>28</sup>

22. *Id.* at 400. See also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984) (looking to minutes of Warsaw Convention to resolve textual ambiguities).

23. See Reagan INF Message, *supra* note 2, at 780 (“we provided detailed written answers to over 1,300 questions for the record from the Committees and individual Senators; and we provided access to the negotiating record of the Treaty, comprising 31 bound volumes”); Koh, Nowak, Rees & Sofaer, *The Treaty Power*, 43 U. MIAMI L. REV. 101, 113-14 (Koh) (1988) (describing waiver of executive privilege on ABM Treaty negotiating documents).

24. *Joint Hearings*, *supra* note 20, at 130 (emphasis added). See also *id.* (response of Senator Biden: “Would you say that again? . . . That is incredible. That is absolutely staggering.”).

25. See INF REPORT, *supra* note 17, at 90-96; Biden & Ritch, *supra* note 2, at 1536-44 (describing contours of the doctrine).

26. See Sofaer, *Treaty Interpretation: A Comment*, 137 U. PA. L. REV. 1437, 1437 (1989) (“The alleged ‘Sofaer doctrine’ is no more than a polemical device, utilized in a political controversy, and has never had any basis in fact.”).

27. 109 S. Ct. 1183 (1989).

28. See *id.* at 1193 (Scalia, J., concurring in the judgment) (criticizing majority for interpreting United States-Canada tax treaty by looking outside its text to preratification Senate

## What's All the Fuss About

Regardless of terminology, two key points emerge. First, as a matter of executive practice, the White House, the Justice Department, and to some extent Judge Sofaer himself have now renounced this absolutist position.<sup>29</sup> Second, no court has yet accepted the strict Sofaer Doctrine, and at least one has squarely rejected it.<sup>30</sup> In March 1988, then-White House Counsel A.B. Culvahouse, Jr. sent a letter to Senator Richard Lugar in connection with the ratification of the INF Treaty conceding that the Executive would be bound under domestic law by an interpretation "authoritatively" presented to the Senate by the executive branch, but only if three "Culvahouse Conditions" were met: the interpretation was "clearly intended, generally understood and relied upon by, the Senate" at the time of its advice and consent.<sup>31</sup> Judge Sofaer himself also embraced those conditions, confirming "the President's duty to consider and, at times, to be bound by Executive Branch representations to the Senate."<sup>32</sup>

The executive branch's suggestion that one can objectively determine what the Senate as a whole "clearly intended, generally understood and relied upon" at the time of advice and consent undercuts its earlier suggestion that the President cannot be bound by what the entire Senate implicitly understood a treaty to mean, because such implicit understandings cannot be gleaned. Even more important, however, in series of interbranch communications, various executive branch officials have distanced themselves from the Culvahouse Conditions.

In his June 1988 statement regarding the Biden-Byrd condition to the INF Treaty, President Reagan made no mention of the Culvahouse Conditions when he declared:

With respect to U.S. law, the President must respect the mutual understandings reached with the Senate during the advice and consent process. . . . Executive statements should be given binding weight only when

materials). Justice Scalia's position in *Stuart* comports with his disdain for reliance on extratextual materials in statutory cases. See generally Fein, *Scalia's Way*, ABA J., Feb. 1990, at 38; Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, 48 CONG. Q. 913 (1990).

29. Executive practice, conducted over a course of time with congressional knowledge and acquiescence, acquires legal force as customary constitutional law. See generally H. KOH, *supra* note 10, at 70-71 (discussing concept of "quasi-constitutional custom"). *Accord*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

30. See *Rainbow Navigation, Inc. v. Dep't of the Navy*, 699 F. Supp. 339 (D.D.C. 1988), *appeal pending*, Nos. 89-5019, -5020 (D.C. Cir. argued Mar. 6, 1990).

31. Letter from Arthur B. Culvahouse, Jr., Counsel to the President, to Hon. Richard G. Lugar (March 17, 1988), reprinted in INF REPORT, *supra* note 17, at 443, 444. The Culvahouse letter purported to reflect the views of the legal offices of the Departments of State and Defense, the Office of Legal Counsel of the Department of Justice, the Arms Control and Disarmament Agency, and the National Security Council. See *id.* at 445.

32. Sofaer, *supra* note 26, at 1440-41.

they were authoritatively communicated to the Senate by the Executive and were part of the basis on which the Senate granted its advice and consent to ratification.<sup>33</sup>

In *Rainbow Navigation, Inc. v. Dep't of the Navy*,<sup>34</sup> now pending before the District of Columbia Circuit, the Justice Department similarly dropped the Culvahouse Conditions. The Department conceded that authoritative representations made by executive officials to the Senate when it gave its consent to a United States-Iceland navigation treaty were not merely precatory, but "entitled to be accorded binding weight as a matter of domestic constitutional law, and the Executive branch fully accepts that it is bound by such statements."<sup>35</sup> The district court accepted those representations, expressing "no doubt about the obligation of the Executive Branch to stand behind the representations made by its officials to the Senate committee having jurisdiction."<sup>36</sup>

Given that the branches now apparently agree that the only negotiating history that counts is that shown to the Senate before it consents, and that the President has agreed to be bound by authoritative treaty interpretations that his officials have shared with the Senate, only one real ground of controversy remains: whether statements that Senators themselves make during the course of advice-and-consent deliberations may be consulted by a court, or other third parties, in determining a treaty's meaning.

Upon examination, however, this point, too, has now been conclusively resolved by judicial decision. In *United States v. Stuart*, decided just last year, six members of the Supreme Court (including, significantly, Chief Justice Rehnquist) declared that "[n]ontextual sources . . . often assist us in 'giving effect to the intent of the Treaty parties,' such as a treaty's ratification history and its subsequent operation."<sup>37</sup> In a footnote, the Court denied that "reliance on the Senate's preratification debates and reports [is] improper. . . . the American Law Institute's most recent Restatement counsels consideration of such materials [and c]onsultation of these materials is eminently reasonable."<sup>38</sup> Justice Scalia's solo concurrence objected that he had "been unable to discover a single case in which this Court has consulted the Senate debate, commit-

33. Reagan INF Message, *supra* note 2, at 780.

34. 699 F. Supp. 339 (D.D.C. 1988), *appeal pending*, Nos. 89-5019, -5020 (D.C. Cir. argued Mar. 6, 1990).

35. *See id.* at 343, citing from Defendants' Reply Brief and Opposition to Plaintiff's Cross-Motion for Summary Judgment at 2 n.2.

36. 699 F. Supp. at 343.

37. 109 S. Ct. 1183, 1191 (1989) (citations omitted).

38. *Id.* at 1192 n.7, citing RESTATEMENT (THIRD), *supra* note 5, § 314, comment d, § 325, reporter's note 5.

tee hearings or committee reports" to interpret a treaty.<sup>39</sup> But as Professor Detlev Vagts recently pointed out in a devastating rejoinder, the good Justice simply had not looked hard enough.<sup>40</sup> Professor Vagts found at least seven Supreme Court cases in the last forty years in which the Court had done just that, including two cases that were decided while Justice Scalia was sitting on the Court.<sup>41</sup> Nor can one simply dismiss the Court's statements in *Stuart* as either dicta or stray language in a footnote. After all, the executive branch has never hesitated to rely on similar dicta in *United States v. Curtiss-Wright Export Corp.*,<sup>42</sup> which declared the President to be the "sole organ of the federal government in the field of international relations," and the Court's entire modern equal protection doctrine has been built upon its famous fourth footnote in *United States v. Carolene Prod. Co.*<sup>43</sup>

Professor Abram Chayes enjoys telling the story of the Southern Baptist minister who when asked, "Do you believe in total immersion baptism?" answers, "Believe in it? I've seen it done." If the question is "do you believe that the Supreme Court can consult extratextual materials, including Senate preratification materials, to determine the domestic effect of a treaty?" the answer is we've seen it done, not just once but repeatedly. And because one of the four hornbook principles listed earlier is that the Supreme Court, not the President or the Senate, has the last word on treaty interpretation, the Court's willingness to refer to extratextual materials must be treated as authoritative.

To summarize, then, despite the political furor that the ABM interpretation controversy raised, its aftermath has resolved most of the outstanding legal issues. Both branches accept four basic principles of treaty interpretation — Presidential power to make a treaty subject to Senate consent, senatorial power to condition its consent, Presidential power to make *only* the particular treaty consented to, and judicial power of final interpretation. While some still quarrel over two much narrower questions — whether the President must honor the understanding of a treaty

39. 109 S. Ct. at 1195 (Scalia, J., concurring in the judgment).

40. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AM. J. INT'L L. 546 (1989).

41. See *id.* at 547 n.5, citing, *inter alia*, *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694, 108 S. Ct. 2104, 2110, 2113, 2115-16 (1988) and *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 107 S. Ct. 2542, 2549, 2559 (1987).

42. 299 U.S. 304, 319-20 (1936). For discussion and criticism of the *Curtiss-Wright* dicta, known to government lawyers as the "'*Curtiss-Wright*, so I'm right' cite," see H. KOH, *supra* note 10, at 93-96 & nn.122, 126.

43. 304 U.S. 144, 152 n.4 (1938). See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* (1980); L. LUSKY, *BY WHAT RIGHT?* (1975); Balkin, *The Footnote*, 83 NW. U.L. REV. 275, 281 n.16 (1989) (collecting citations to articles citing footnote four).

that the Senate shares, and whether one may divine that understanding by looking to materials outside the text of the treaty — both questions have now, through executive practice and judicial decision, been substantially settled in the Senate's favor. To my mind, this result is not just good constitutional law. It makes good common sense. And if we can all agree on that, then perhaps my fellow panelists and I can simply adjourn to the lounge for a glass of orange juice — with vodka, if they'd like.